UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1, SUBREGION 34

U.S. COSMETICS CORPORATION and TYLER HOAR, AN INDIVIDUAL	Case No. 01-CA-135282
U.S. COSMETICS CORPORATION and WILLIAM ST. HILAIRE, AN INDIVIDUAL	Case No. 01-CA-139115

MOTION TO COMPEL COMPLIANCE WITH THE ADMINISTRATIVE LAW JUDGE's PREVIOUS ORDER TO STRIKE

Respondent USCC hereby respectfully moves to compel compliance with the Administrative Law Judge ("ALJ"), Ira Sandron's, previous order striking from the record Ms. Howlett's improper commentary and *ad hominem* attacks against opposing counsel. In support hereof, Respondent states as follows:

I. BACKGROUND OF MS. HOWLETT'S RECKLESS ALLEGATIONS

As the ALJ will recall, during the course of the trial, Ms. Howlett made a number of irresponsible and false accusations against opposing counsel, Mr. Takagi, Mr. Desjardins, the ALJ, and others. These false allegations began after Ms. Howlett was caught giving opposing counsel different exhibits than those she gave the ALJ, even though she purported she was handing the same exhibits to both. Tr. 106-109. She purposefully left off pages from Respondent's exhibits, and attempted to staple together, for the Court's version of the exhibit, two documents that did not belong together and

were not exhibits. *Id*. She provided opposing counsel with a different version so that Respondent's counsel would not be aware that she had provided the ALJ an exhibit that improperly combined two documents that did not belong together. *Id*.

Then Ms. Howlett falsely claimed the ALJ was involved in an *ex parte* communication with Respondent's counsel, when the discussion was about something innocuous like going to the bathroom or taking a break. Ms. Howlett then imprudently sent the regional counsel into the hearing room, who repeated the false allegations she had heard misreported from Ms. Howlett. That regional counsel then was forced to apologize and withdraw -- what she herself characterized as -- her intemperate allegation, after learning the actual facts about the innocuous nature of the discussion from the ALJ.

Ms. Howlett's reckless conduct did not end there. She engaged in misleading conduct (Tr. 741) and made other false allegations that she later had to retract. Tr. 999-1000. She made baseless allegations of perjury against Mr. Takagi, premised on her provision of an incomplete exhibit that lacked the original attachments, Tr. 1687-88, and Tr. 1030-31. She premised such reckless allegation of perjury on her false assertion that a subpoena and a document request to which Mr. Takagi was responding were identical, when in fact they were not at all the same.

Howlett also falsely accused the Respondent of producing a doctored email. Her only basis for claiming it was "doctored" was that it lacked a signature block, which she claimed could not be so, based on her alleged "expertise in Japanese culture." (Mr. Desjardin was American). She further asserted that she had carefully combed the record and the document was the only instance of no signature block. The undersigned produced the original electronically, and the General Counsel analyzed the beta

information and then had to admit it was the original and it indeed had no signature block. Moreover, Howlett subsequently produced in her own case another email by Desjardin that also had no signature block, thereby proving that she knowingly had made a false and reckless assertion that she had combed the record and that the email at issue was the only one that had no signature block.

Throughout the trial, Ms. Howlett interrupted the court and opposing counsel (Tr. 2983, 2827, 2788-2800, 2512-14, 2491). The court had to tell Howlett that her conduct was improper and that she should not argue with his orders. (Tr. 1566). She was found to repeatedly coach witnesses. (Tr. 1570, 1574-5, 1583, 2495, 1455-56, 1529-30, 1541). She confused her role with that of the ALJ when she complained to him that he was interrupting her. Tr. 2826. The record is replete with more examples.

The conduct of Ms. Howlett producing falsified documents came to a head when Andrew Rucci testified that Essie Ablavsky, who was assisting Ms. Howlett, produced at the hearing a false affidavit that Ms. Ablavsky had never actually showed to him, after a short interview at a McDonald's where she gave him only the final page, and afterwards she filled in the number 6 to indicate it was six pages long, when instead only the final page had been shown to him. Tr. 2901. The ALJ indicated that there was ample evidence that the affidavit was bogus. Tr. 2906. Mr. Rucci also described other completely improper conduct from Ms. Ablavsky when she tried to suggest testimony to him and tell him what she claimed other witnesses had told her, Tr. 2794, 2796, in order to try to improperly influence his testimony. Because of such improper conduct, Mr. Rucci ultimately indicated to Ms. Jones that he wanted to have a witness present when he talked with Ms. Ablavsky. His concerns ended up proving well founded when Ms.

Ablavsky produced at trial a bogus affidavit he had never seen. Amongst the compelling evidence that it was bogus was its inclusion *inter alia*, of a false statement that "Mr. Katsumi" was an "owner" of the company (which Katsumi never was—he was a mere employee), even though Mr. Rucci had no idea who Mr. Katsumi was and had never heard of him before.

After Ms. Howlett was caught in so many efforts at falsification and making so many unfounded and reckless allegations that were proven false, the ALJ finally stated that Ms. Howlett needed to focus on the evidence and her case, instead of repeatedly making ugly allegations. Tr. 1030-31 (improper conduct allegations should not be brought in this forum); Tr. 2800 (improper conduct allegations are "not before me").

At one juncture, Ms. Howlett was personally attacking Respondent's counsel about an isolated case in Respondent's counsel's career from nine years ago in the Sothern District of New York in which Respondent's counsel complained about a judge who then retaliated with sanctions and requested discipline against her. Ms. Howlett actually began reading into the record that ancient case. Respondent's counsel then indicated that she was appalled and that she did not have to be subject to personal attack and would bring the issue to the attention of a higher authority. In response, ALJ Sandron indicated that he would not indulge Ms. Howlett's putting that ancient case on the record, that he would strike it from the record and would not permit such personal attacks to persist.

Respondent's counsel's made efforts to respond to the ALJ's calls to change the tenor and to stick to the evidence. Respondent's counsel informed the court that she "respected [his] rulings," even when she disagreed with them and that she would abide by

them. *See, e.g.,* Tr. 2899. Despite the viciousness of Ms. Howlett's attacks against Respondent's counsel, personally, against Mr. Takagi, the company, and Mr. Desjardin, by way of example (all whilst Ms. Howlett knew Respondent's counsel was in tender emotional shape because her father was deathly ill), Respondent's counsel made an effort to rise above Ms. Howlett's personal attacks. Ultimately, the ALJ "commended" Respondent's counsel on the record for staying above the fray and conforming her behavior to his requests. Tr. 2182.

II. MS. HOWLETT HAS VIOLATED BOTH THE LETTER AND THE SPIRIT OF THE ALJ'S ORDER TO STRIKE SUCH COMMENTARY FROM THE RECORD

In footnote 4 of her Post-Trial Memorandum, Ms. Howlett once again makes personal, improper attacks, along the very same lines that the ALJ ruled should be struck from the record, and which he ordered should not be part of the record at all. Disobeying both that order and the ALJ's repeated admonition that allegations of improper conduct were not before him and should not be raised in this venue, (Tr. 2800, 1301-31), Ms. Howlett distorts the record and attempts to make it appear that the one sanctions/discipline issue relating to the case before Judge Baer in April 2007 is in fact multiple cases of repetitive conduct. In fact, it is an isolated case from nine years ago that gave way to automatic reciprocal discipline, **which most actually courts refused to follow.**

Here are the real facts: nine years ago in April 2007, Judge Baer issued a confidentiality order ("CO"). The firm with which I then practiced, Dorsey & Whitney, believed that the CO did not apply to what they believed was a continuing litigation of the same case in Massachusetts. I received, in writing, research from two associates that

it was a continuing litigation to which the CO did not apply. I received advice from three partners, including a written opinion from Zachary Carter (a former magistrate judge and now the attorney for the city of New York), that the CO did not bar the use of transcript excerpts in the continuing case.

Judge Baer did not *just* sanction me for that issue, he sanctioned the whole Dorsey firm. Ms. Howlett incorrectly claimed that sanction was affirmed. It was not, which the Second Circuit clarified in a 2011 related decision, in which discipline was vacated.

Even though Judge Baer made clear that the whole Dorsey firm should be sanctioned and recognized that I relied on the advice of five Dorsey attorneys, he only asked that I be disciplined for that charge. During the disciplinary hearing, Zachary Carter testified that I reasonably relied on the research and advice of the Dorsey attorneys. It is my position that the reason that Judge Baer brought these sanctions against me and sought that only I be disciplined for conduct for which he sanctioned the whole Dorsey firm is because he was retaliating against me for complaining about him (after the NY case was already concluded) to the Chief Judge of the SDNY. Tellingly, there were no sanctions brought or pending against me during the (merely three week) life of that case before Judge Baer[1]. It was only after the case was over, when Judge Baer learned I complained about him, that he brought the sanctions. This had the calculated result of chilling my pending judicial ethics complaint against him. It is true that I was eventually disciplined by his SDNY colleague for that nine-year old matter (after an initial Second Circuit reversal).

[1] Because of personal jurisdiction issues, the case was voluntarily dismissed and refiled in Massachusetts.

Unfortunately, reciprocal discipline in all other courts and bars is *usually automatic,* thereafter. However, what is **most telling** is how **most courts either refused to discipline me at all**, or ensured that discipline was *nunc pro tunc* and had little to no real effect. It is highly unusual for courts not to impose automatic reciprocal discipline. Under the reciprocal discipline rules, the courts and bars have to assume that the original findings are all correct. However, most judges, bars and courts to which I am admitted refused to impose reciprocal discipline because it is very clear that I was retaliated against for complaining about judge Baer, I was blamed for the conduct of others, and there was no harm to anyone from my conduct because the excerpts were filed under seal and all transcripts were returned.

- For instance, the Bar of CT (my home state, where I am best known) held a 3-1/2 day trial on the reciprocal matter and decided in May 2015 to impose **NO** discipline. Ms. Howlett falsely claims I was disciplined in Connecticut. The reporting obligation to which she refers, which has now terminated, was something I suggested to that court I would be happy to do; it was not "discipline".
- The Second Circuit itself imposed **NO** discipline, even though I am a member of the Second Circuit bar.
- The United States Supreme Court decided to impose **no** discipline, even though I am a member of that bar
- The US Court of Appeals for the Fourth Circuit decided to impose **no discipline**
- The U.S. District Court of Connecticut's hands were tied because their rules require automatic discipline. So that court waited until the discipline was less

than a week from expiring, imposed it *nunc pro tunc*, automatically reinstated, and I did not miss a beat in handling the ongoing cases I had pending there;

- The D.C. Circuit (where I was an Assistant U.S. Attorney) waited until the discipline already expired, imposed discipline *nunc pro tunc,* so that it was over before it began, and automatically reinstated me.
- The State Bar of New York also waited until the discipline was almost expired (one-month away), and then imposed discipline *nunc pro tunc* to minimize any disruption to my practice.
- The Eastern District of New York also imposed suspension *nunc pro tunc* and reinstated me without a hearing

Thus, the vast majority of the courts went out of their way -- quite unusually-- to avoid disciplining me at all or to impose it *nunc pro tunc*, because what happened to me nine years ago was so patently unfair. The Maryland reciprocal decision is an outlier, which misinterprets some of the facts found from many years ago.[2] The Chief Judge and two other judges dissented. Mandate has not issued, because that court appears to be reconsidering that decision. The federal court covering Maryland (the Fourth Circuit) also apparently thought the Maryland decision was incorrectly decided because, <u>after</u> the Maryland decision was issued, the Fourth Circuit refused to follow Maryland and decided that **no** reciprocal discipline should issue.

[2] Given that I had already deactivated from the state bar of Maryland, I believed I did not have a reporting obligation there. I had not practiced there in over eighteen (18) years. Apparently, some of the judges disagreed and disbarred because of the failure to report, despite being deactivated.

The dissent in that Maryland decision makes clear that the matter involves an isolated incident that arose nine years ago, and that I have been practicing non-stop since these underlying events nine years ago, without any other issues ever arising. The Second Circuit, the Southern District of New York, the State Bar of Connecticut, all make clear in their decisions that in my 29 years of practicing law, I have never had a single incident of being sanctioned or disciplined other than in relation to that underlying case before Judge Baer, which arose after I complained about him to the Chief Judge. I have never been disciplined or sanctioned in the twenty years before I complained about Judge Baer, nor in the nine years since. I am presently in good standing in eight federal and state bars.

Thus, Ms. Howlett's claims in footnote 4 are, at best, misleading and, at worst, gratuitously nasty and scurrilous. There are not "several" different ***states*** involved in disciplining me, and there is only one case from nine years ago. Courts are required to accept all the findings when they issue reciprocal discipline. However, court after court has gone out of its way to either impose no discipline, or to avoid the practical effects of that very unfair original case.[3]

Tellingly, Ms. Howlett has failed to report that most judges considering reciprocal discipline have seen the matter for what it was and have imposed no, or in effect no, discipline. She fails to accurately report that in the twenty years before, and in the nine

[3] The findings from the original Southern District of New York decision have to be accepted in reciprocal proceedings. Thus, these other judges in the reciprocal matters are not making new findings, they are relying on the findings already made in the original SDNY decision. The Maryland decision contains merely the same SDNY findings repackaged, nine years later, with sufficient error that reconsideration is now occurring.

years since that case, I have never been grieved by any client or opponent, I have never been sanctioned, and I have never been otherwise disciplined.

Thus, her constant personal attacks are misplaced against both the client, and its counsel, and they violate both the letter and the spirit of the ALJ's order. Respondent heeded the ALJ's requests by submitting an elevated and professional post-trial brief, that refrained from personal attacks and adhered to a professional recitation of the law and the facts. It is Respondent's hope that this matter and the decisions can be resolved without acrimony and in a collegial and professional way, devoid of personal attacks.

For all the above stated reasons, USCC respectfully requests that the ALJ strike from Ms. Howlett's post-trial brief footnote 4 and the personal attacks against opposing counsel, as they are a violation of the ALJ's order striking such references from the record.

Respectfully submitted,

USCC

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CERTIFICATE OF SERVICE

I certify that a copy of the above (albeit without typos corrected or this certification) was sent to all parties to this NLRB action at the following email addresses on May 16, 2016:

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/s/ *Kristan Peters-Hamlin* dated: May 16, 2016